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No. 06-130

In the Supreme Court of the United States

JOHN A. PALAKOVICH, SUPERINTENDENT OF SMITHFIELD SCI; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Petitioners,

v.

CLAYTON THOMAS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DANIEL SILVERMAN
Silverman & Associates, P.C.
1429 Walnut Street
Suite 1001
Philadelphia, PA 19102
(215) 665-8622

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

DAVID T. GOLDBERG
David T. Goldberg Law Office
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

**Counsel of Record*

QUESTIONS PRESENTED

1. Did trial counsel provide ineffective assistance in violation of the Sixth Amendment when, solely because of a mistake of law, he failed to move to suppress or otherwise object to an unreliable eyewitness identification when there was no physical evidence linking defendant to the crime and a motion to suppress or an objection would likely have been successful?

2. May a federal habeas court, consistent with the Anti-Terrorism and Effective Death Penalty Act, reject a state court finding that trial counsel's failure to seek suppression of an unreliable identification was strategic when the federal court, after holding an evidentiary hearing, determines both that the state court finding "was based on nothing more than speculation" and that the trial attorney did not believe he could seek suppression because he misunderstood the law?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

A. Pre-Trial and Trial Court Proceedings

Respondent Clayton Thomas was convicted of second-degree murder, robbery, aggravated assault, and possession of an instrument of crime, in connection with a robbery and shooting that occurred on December 9, 1992. During the robbery, Henry James was fatally shot at the speakeasy he ran out of his home and Peter Fuller, a patron of the speakeasy, was wounded. Pet. App. 7. At trial, the prosecution presented no physical evidence connecting Thomas to the crime. The only evidence connecting him to the crime was a spontaneous in-court identification by Fuller, who had testified at a preliminary hearing that (1) he could not identify Thomas and (2) that his earlier choice of Thomas's photograph from a photo array would never have occurred had the investigating officer not segregated out Thomas's photo, along with that of his alleged accomplice, from all the others and told him to take a "'real good' look." Pet. App. 9.[1]

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[1] The prosecution also called a second witness, Christopher Young, who had also been present at the bar the night of the shooting. Pet. App. 9. Like Fuller, Young had earlier identified Thomas to the police as the perpetrator but was unable to identify him at the preliminary hearing. At both the preliminary hearing and the trial, Young explained that he had made the identification after police threatened that he would be charged with the crime unless he inculpated Thomas. Pet. App. 70. He later refused to identify Thomas at trial. Indeed, the prosecution was able to place the earlier "identification" before the jury only by calling Young as a witness and then impeaching his testimony with his ostensibly inconsistent prior statement. Pet. App. 70.

Although Thomas's attorney had initially moved to suppress Fuller's identification on the ground that the police tactics had been unconstitutional, he withdrew that motion after the preliminary hearing when Fuller failed to identify Thomas. Pet. App. 34. When Fuller identified Thomas as the shooter from the witness box, however, defense counsel neither objected nor moved to strike the testimony. Pet. App. 9. Later, the attorney testified that his failure to suppress Fuller's identifications resulted from his having been "completely surprised" by Fuller's abrupt change of testimony and from the attorney's mistaken assumption that the law did not provide a means for striking or suppressing a witness's identification once made in open court. Pet. App. 53.

B. Post-Trial Proceedings in the Pennsylvania Courts

After his conviction was affirmed on appeal, Pet. App. 43, Thomas filed a *pro se* petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. § 9541 *et seq.*, alleging, *inter alia*, ineffective assistance of counsel with respect to Fuller's identification. Rejecting Thomas's request for an evidentiary hearing on the ineffective assistance issue, the PCRA court summarily denied the petition, a decision the Pennsylvania Superior Court affirmed. Pet. App. 44.

The Superior Court concluded that the attorney's failure to object to the identification reflected a defense "strategy of proving that the police were trying to frame Appellant for a crime he did not commit so they could close their books on the incident." Pet. App. 129. Allowing the jury to hear that the police had "essentially coerced Mr. Fuller into identifying photographs of [Thomas and his co-defendant]," the court reasoned, had "materially advanced this strategy." Pet. App. 129. Because it "conclude[d] that trial counsel was not ineffective," Pet. App. 129, the Superior Court did not reach the question whether his failure to seek suppression was

prejudicial. The Pennsylvania Supreme Court denied Thomas's request for an appeal. Pet. App. 44.

C. Federal Habeas Proceedings

Respondent then filed an application for post-conviction relief in federal district court under 28 U.S.C. § 2254. The magistrate judge to whom the case was referred found sufficient merit in Thomas's identification claim to hold an evidentiary hearing. Pet. App. 97-99, 108. The Pennsylvania court's belief that Thomas's counsel did not object to the identification for strategic reasons, the magistrate judge found, was "based on mere speculation." Pet. App. 97 (footnote omitted). As the magistrate judge noted, "the record also supports a contrary finding that counsel failed to appreciate that he could have had the in-court identification suppressed altogether while still arguing police overreaching." Pet. App. 98. The magistrate judge did "not necessarily discredit the Superior Court's speculation as to defense counsel's supposed strategy" but he declined to "presume it correct absent factual findings made after a full and fair evidentiary hearing on the record." Pet. App. 98. Because the state court had denied Thomas an opportunity to develop the factual basis of his habeas petition, the magistrate judge granted Thomas an evidentiary hearing on this single ineffective assistance claim. Pet. App. 98-99, 107-108.

Thomas's trial counsel testified at the hearing and explained his reasons for not moving to suppress the in-court identification. According to the magistrate judge,

> at no point did [trial counsel] even intimate that he ever had any type of strategy or grand plan to use this identification for the defense's advantage. Rather, his sole explanation was that he was completely surprised by the identification at trial and did not know he could move to suppress it after it already had been elicited.

Pet. App. 53. The magistrate judge then concluded that Thomas's counsel could have moved to suppress the in-court identification while still asking Fuller about the suggestive photo array the police had shown him. Because doing so "would have had the benefit of showing police overreaching and evidence manipulation, without the detrimental identification of [Thomas] as the shooter * * * counsel's failure to move to suppress and/or strike Fuller's in-court identification did not constitute reasonable trial strategy." Pet. App. 53-54. Then, proceeding to the merits, the magistrate judge found that the identification was improper, Pet. App. 59-69, and that defense counsel's failure to move to suppress it had caused prejudice, Pet. App. 70-71. He accordingly recommended to the district court that habeas relief be granted.

The district court accepted the magistrate judge's recommendation. Pet. App. 39. Like the magistrate judge, the district court recognized that it did not need to "defer" to a state court conclusion that amounted to "mere[] speculat[ion] as to the existence of a trial strategy." Pet. App. 34 (footnote omitted). The district court then found that trial counsel's failure to move to suppress the identification represented deficient performance which had prejudiced Thomas. As the district court explained, "[f]ailure to object to an unreliable eyewitness identification is manifestly prejudicial where, as here, there was no physical evidence linking [Thomas] to the crime and the only other eyewitness was also unreliable." Pet. App. 38.

The United States Court of Appeals for the Third Circuit unanimously affirmed. Pet. App. 26. Applying the two-pronged test of *Strickland* v. *Washington*, 466 U.S. 668 (1984), the court of appeals found both deficient performance and prejudice. With respect to the first prong, it granted the State "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,"

Pet. App. 16, and held that Thomas could prevail only by "overcom[ing a] presumption that * * * the challenged action might be considered sound trial strategy," Pet. App. 16-17 (quoting *Strickland*, 466 U.S. at 689). It held, however, that the district court's factual finding that trial counsel's failure to move to suppress or object was "not in fact part of a strategy," Pet. App. 19, but was rather the result of a mistake of law—the belief that "he was not permitted to object or move to suppress the identification once it had already been made," Pet. App. 19—rebutted the "strong presumption that "counsel's conduct [fell] within the wide range of professional assistance," Pet. App. 16. The court of appeals observed "that the purported strategy [the state court had ascribed to Thomas's lawyer]—allowing the identification in order to cross-examine Fuller about the improper police efforts in obtaining the identification"—would necessarily have been unreasonable: "Even if the identification was never made or was suppressed, [the lawyer] was still free to question Fuller about the police tactics in procuring his since-disavowed identification during the photo array." Pet. App. 19.

The court of appeals then went on to address the issue of prejudice, reviewing the relevant facts *de novo* since prejudice had never been considered in the Pennsylvania court proceedings. Pet. App. 23. Concluding that "counsel's error in failing to move to suppress or object to the identification at trial clearly undermined the reliability of the verdict," Pet. App. 26, the Court affirmed the district court's grant of relief. The State petitioned for rehearing, but no judge voted to rehear the case. Pet. App. 2-3.

On March 10, 2006, the district court entered an order at the Third Circuit's direction granting habeas relief and directing that Thomas be released if not retried within 180 days. Because the State never sought a stay of this order and never retried him, after 180 days Thomas filed a motion for

release with the district court. On October 10, 2006, the district court ordered that Thomas be released from custody within 30 days unless the State obtained a stay of its new order from the Third Circuit or from this Court. The State then filed a motion to recall the mandate and/or stay the proceedings with the Third Circuit, which was denied on November 3, 2006. On November 10, 2006, Thomas filed a motion in district court asking it to enforce its order of October 10 and to secure an order directing that he be released. As of the morning of November 10, 2006, Thomas knew of no effort by the State to obtain a stay of the district court's order from this Court.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT'S DECISION IS CORRECT AND DOES NOT CONFLICT WITH THE LAW IN ANY OTHER CIRCUIT

In affirming the district court's conclusion that Thomas was denied his constitutionally guaranteed right to effective assistance of counsel, the Third Circuit correctly applied this Court's settled precedent. Recognizing that *Strickland* v. *Washington*, 466 U.S. 668 (1984), required Thomas to show both that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *id.* at 687, and that the deficient performance prejudiced his defense, the court of appeals correctly concluded that Thomas had carried his burden on both prongs. That fact-intensive application of the *Strickland* standards was entirely correct and does not warrant further review by this Court.

The court of appeals correctly found that Thomas's attorney performed deficiently by failing to object to critical prosecution evidence solely because he was unfamiliar with

clearly settled legal principles[2] and misunderstood the law. Additionally, the court was correct in determining that this deficient performance prejudiced Thomas by denying him the opportunity to suppress the testimony of a key prosecution witness. Had Thomas been afforded the opportunity to challenge this "key" testimony "there is a reasonable likelihood that the result of the trial would have been different." Pet. App. 26.

The petitioners' claim of circuit conflict is unfounded. There is no conflict between the Third Circuit's decision and decisions of the First, Ninth, Tenth, and Eleventh Circuits.[3] Petitioners cite *Cofske* v. *United States*, 290 F.3d 437 (1st Cir. 2002), as evidence of the First Circuit's disagreement with *Thomas*'s position. Pet. 14. Petitioners' reading of *Cofske*,

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[2] Wayne R. LaFave et al., *Criminal Procedure* § 11.10(c), at 641 (4th ed. 2004). ("Lower court rulings suggest several factors that are most likely to result in a finding of incompetency. Perhaps the easiest is that in which the record reveals that counsel failed to make a crucial objection or to present a strong defense solely because counsel was unfamiliar with clearly settled legal principles."); see also *Kimmelman* v. *Morrison*, 477 U.S. 365, 385 (1986) (finding deficient performance where the defendant's attorney, because of a "startling ignorance of the law," failed to assert a timely objection to illegally seized evidence).

[3] The "disagreement" that Petitioners claim warrants this Court's intervention—between "circuits [that] recogniz[e] that counsel's statements may help establish the context for evaluating objective reasonableness," but refuse to treat "a lawyer's explanation of his rationale" as "dispositive," and others, which "hold that an attorney's misplaced or deficient justification for his conduct can provide a basis for ineffectiveness relief, even if other lawyers could have articulated reasonable grounds for following exactly the same course," Pet. 10—is, as a matter of logic and law, illusory. It is entirely consistent for a court to take the position that counsel's statements may be a factor but not dispositive in establishing deficient performance. In short, even if the cases offered by petitioners fell into the two positions they identify—which they do not—the different approaches would not comprise a circuit conflict necessitating this Court's review.

however, is incorrect. They quote the *Cofske* court as stating, "[i]f anything turned on counsel's *precise* thought process, we would remand for an evidentiary hearing, but in this case none is necessary[.] * * * [A]s long as counsel performed as a competent lawyer would, his or her *detailed* subjective reasoning is beside the point." Pet. 14 (quoting 290 F.3d at 444) (emphasis added). This language is not inconsistent with *Thomas*'s holding. The clear language quoted above, its context in the court's opinion, and the particular facts of *Cofske* reveal that the court was not indicating that counsel's internal thought process was irrelevant. Rather, the court was expressing its view that examining counsel's *precise* and *detailed* thought process was unnecessary to decide that particular case because the court had *already* (in the four paragraphs and footnote preceding the language quoted by petitioner) delved deeply enough into counsel's thought process to discern—and affirm—the reasonableness of his conduct. *Cofske*, 290 F.3d at 434-444 & n.7.

Indeed, the importance of counsel's thought process is apparent on the opinion's face. Contrary to petitioners' claim, the First Circuit plainly states that it *was* concerned with the motives supporting counsel's actions. The court highlights that "Cofske's trial counsel did not overlook the [disputed] issue." *Cofske*, 290 F.3d at 443. If he had, moreover, the court indicated that an in-depth inquiry into the attorney's actual thinking would be necessary: "If counsel gave away *without any cause* a *known* argument which had at least some basis in guideline language and policy, this would at least take some explaining." *Ibid.* Once the court had determined that counsel had made a strategic choice and that the strategic choice was reasonable, it saw no need to inquire further into the attorney's internal decision making. Thus, far from being uninterested in counsel's internal thought process, the court in *Cofske* merely determined that it did not need to know counsel's *precise* thoughts when the strategic nature of counsel's conduct was apparent on the face of the record. In

fact, the court found counsel's conduct to be reasonable only after it was satisfied that counsel's actual decision making met a threshold level of reasonableness: that counsel did not overlook a central issue and did not give away a known argument without any cause. *Thomas* is precisely the opposite. Counsel here, out of simple ignorance of the legal rules, did overlook a central issue and did give away without any cause an opportunity to suppress unreliable testimony.

On its face, moreover, the language petitioners quote undercuts their position. The First Circuit rejected Cofske's ineffective assistance claim not because "counsel performed as a competent lawyer *could*" have but rather because he performed as "a competent lawyer *would*" have. *Cofske*, 290 F.3d at 444. The use of "would" makes all the difference. Under petitioners' reasoning, a court should reject an ineffective assistance claim—no matter how great the mistake of law it rests on—whenever a court can "speculate about hypothetical strategies," Pet. 17, that might have led a reasonable attorney to take the same course for other reasons. That is not the First Circuit's approach, however. The very language petitioners quote shows that the First Circuit looks to see whether a reasonable lawyer in defense counsel's position *would* have made the same decision, not whether a hypothetical lawyer *could* have made it. Given the plea agreement in *Cofske*, the First Circuit found, a competent lawyer would have acted exactly as Cofske's counsel did. As the First Circuit explained, "given the threatened consequences to Cofske of backing out of the plea agreement it is *impossible* to see how Cofske * * * could have been better off if his counsel had challenged use of the state conviction." 290 F.3d at 444 (emphasis added). *Cofske* and *Thomas* are not in conflict.

There is also no merit to petitioners' claim that *Thomas* conflicts with the Tenth Circuit's position in *Bullock* v. *Carver*, 297 F.3d 1036 (10th Cir. 2002). The seemingly

supportive language petitioners extract from that case—"[i]t appears as [the defendant] contends, that at least one of his attorneys * * * did not fully grasp [applicable law] and erroneously concluded that the children's hearsay statements * * * would be admitted under any circumstances," Pet. 15 (quoting *Bullock*, 297 F.3d 1053)—does not fairly represent the Tenth Circuit's reasoning. The defendant in that case had *two* attorneys, and the appeals court found that "it is [] clear from the record that [the defendant's] trial attorneys *did know* that, under general evidentiary rules, they could challenge the use of at least some [*sic*] the hearsay evidence, but elected not to do so for strategic reasons." *Bullock*, 297 F.3d at 1045 n.4.

This distinction is important for two reasons. First, it undercuts any notion that the attorneys in *Bullock* failed to act because of a mistake of law. As the Tenth Circuit held, "in regard to the hearsay evidence, we disagree with the notion that Mr. Bullock's attorneys acted in complete ignorance of the possibility of excluding the children's hearsay statements." 297 F.3d at 1045 n.4. Here, by contrast, Thomas's counsel acted without any awareness of the likely successful legal avenue for excluding the in-court identification.

Second, the Tenth Circuit found that the choice Mr. Bullock's two attorneys made not to exclude the children's hearsay testimony was not only informed and strategic, but also compelling. After carefully analyzing the trial lawyers' choice not to object to that testimony, the Tenth Circuit found that

> as [one of the trial lawyers] pointed out during the evidentiary hearing, if the hearsay statements had been excluded, then the only testimony presented by the prosecution would have been the direct testimony of the children, and it is objectively reasonable to conclude, *as Mr. Bullock's attorneys in fact concluded*, that directly

> attacking the children on cross-examination would not have been an effective trial strategy to produce an acquittal. Further, it is undisputed that by admitting the hearsay statements, Mr. Bullock's trial counsel was able to (1) highlight inconsistencies and contradictions in the children's testimony, (2) expose Dr. Snow's unprofessional interview tactics, (3) reveal ways in which the children may have "contaminated" one another, and (4) generally argue that the children's allegations resulted from Dr. Snow's pressure tactics.

297 F.3d at 1054 (emphasis added). Here, by contrast, the Third Circuit—looking at what Thomas's attorney had in fact concluded—found that his failure to object to the eyewitness identification was uninformed, non-strategic, and objectively unreasonable. No competent attorney, the Third Circuit concluded, would have failed to move to suppress the eyewitness identification. The supposed "frame-up" strategy, which petitioners argue could have justified a hypothetical attorney's failure to object, does not, the Third Circuit specifically stated, "even appear to be reasonable." Pet. App. 19.

Moreover, any attempt to manufacture a conflict between the Third and Tenth Circuits based on language extracted from *Bullock* collapses on examination of later decisions of the Tenth Circuit. In *United States* v. *Nguyen*, for example, the Tenth Circuit made clear that what the attorney "in fact" thought is central to the Sixth Amendment inquiry: "Where it is shown that a particular decision was, *in fact, an adequately informed strategic choice*, the presumption that the attorney's decision was objectively reasonable becomes 'virtually unchallengeable.'" 413 F.3d 1170, 1181 (10th Cir. 2005) (citing *Bullock*, 297 F.3d at 1044) (emphasis added).

Petitioners' claim of a conflict between the Third and the Eleventh Circuits is similarly without merit. Although

petitioners cite a footnote from *Chandler* v. *United States*, 218 F.3d 1305, 1316 n.17 (11th Cir. 2000), Pet. 16, as establishing a circuit conflict, a careful reading of the opinion in which it appears makes clear that the *Chandler* footnote cannot possibly bear the weight petitioners assign it. The *Chandler* court emphasized, in fact, the narrowness of its holding, noting that "[t]here are different kinds of ineffective assistance claims. Here, Petitioner *does not allege* that his trial counsel's performance was impaired by an incapacity (mental or physical), a conflict of interest, bad faith, or *an unreasonable mistake of law*. Therefore, *we decide nothing today about these other kinds of cases*." *Id.* at 1313 n.11 (emphasis added). Because the Third Circuit decision here involved one of the specific "other kinds of cases"—an attorney's "unreasonable mistake of law"—that the Eleventh Circuit in *Chandler* specifically refused to say anything about, it is impossible to say that the decisions conflict.

Moreover, the court in *Chandler* specifically noted that its finding of counsel effectiveness rested on a nine-part (and numerous subpart) totality of the circumstances test. In order to dispel any doubt, the court set out the very precise and narrow legal question it was answering:

> The record in this case—even when read in Petitioner's favor—presents this legal question: Has a defendant proved his lawyer's performance to be deficient * * * when the defendant * * * is convicted of procuring a murder and his lawyer has invested most of his time and energy in defending against conviction; when the evidence of guilt is not overwhelming, relying largely on the testimony of the actual killer who has told a variety of stories and who has been promised that he will not be executed; when defense counsel did present witnesses as well as other evidence in mitigation; when defense counsel did not present other character witnesses who would have testified to his past good works; when no one knows what

> instructions and information about the availability and use of character witnesses were supplied by defendant to defense counsel; when defense counsel has never said that the pertinent character witnesses would be compelling or that he would have used them; *when nothing indicates that defense counsel's act in not presenting more character witnesses was caused by his having some erroneous view of the law*; when defense counsel argued to the jury at sentencing that the evidence that defendant actually prompted the admitted killer to do the killing was in dispute * * *; when defense counsel stressed the lack of a criminal record for his client and that the actual killer would not be executed?

218 F.3d at 1325-1326 n.41 (emphasis added). Not only does *Thomas* present a very different combination of factors, but it also differs in one respect that the *Chandler* court identifies as pivotal. *Thomas* rests on a mistake of law; *Chandler* does not.[4] These two cases present no conflict.

Nor is the Ninth Circuit's opinion in *Bonin* v. *Calderon*, 59 F.3d 815 (9th Cir. 1995), the final case petitioners claim as evidence of a circuit conflict, in any tension with the Third Circuit rule. Petitioners quote two sentences from that opinion for the proposition that the Ninth Circuit does not

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[4] For additional evidence that the Eleventh Circuit is in accord with the Third Circuit, see *Smith* v. *Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999) ("Ignorance of well-defined legal principles is nearly inexcusable."); *Cave* v. *Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992) (finding counsel's performance deficient where counsel's course of action was predicated on her "unreasonably high opinion of her ability as a lawyer and [] rather than adopting a strategy to confuse the jury on the law, she had simply misunderstood the elements of the charges faced by her client"); see also *Black* v. *United States*, 373 F.3d 1140, 1144 (11th Cir. 2004) ("[C]ounsel's ignorance of a well-defined legal principle could be inexcusable and demonstrate ineffective performance by counsel.") (citing *Smith*, 170 F.3d at 1054).

look at "the actual internal thought processes of the lawyer" in evaluating attorney competence.[5] Pet. 14. These two sentences, however, emphasize only that the Ninth Circuit uses an "objective standard" to evaluate attorney competence, one that finds ineffective assistance only when counsel's performance falls below the standard of "objective reasonableness." Pet. 15. In doing so, the Ninth Circuit is not, as its decision makes clear, rejecting inquiry into a defense attorney's actual reasons for failing to object or raise a legal claim but merely following this Court's (and the Third Circuit's) formulation of the first prong of the *Strickland* test: "In reviewing [the attorney's] performance, the ultimate question is whether 'counsel's representation fell below an objective standard of reasonableness.'" 59 F.3d at 833 (quoting *Strickland*, 466 U.S. at 688).

The *Bonin* court saw no tension between applying this "objective standard" and examining why an attorney acted as

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[5] Petitioners quote the following:

> Because we use an objective standard to evaluate counsel's competence, once an attorney's conduct is shown to be objectively reasonable, it becomes unnecessary to inquire into the source of the attorney's alleged shortcomings. . . . Because we conclude, as the district court did, that [counsel]'s performance did not fall below the standard of objective reasonableness, it is irrelevant whether counsel used drugs.

Pet. 15 (alteration and omission in original). The very next sentence, however, which petitioners fail to quote, undercuts the interpretation they offer of the two sentences above. The *Bonin* court continues: "Because evidence of drug use is not relevant in and of itself, the district court did not abuse its discretion in refusing to admit evidence [the attorney] used drugs." 59 F.3d at 838. As this sentence shows, the court is *not* holding that it would not inquire into or consider the attorney's reasons for his actions because an attorney's thoughts are irrelevant. Rather, the court is merely noting that drug use *in and of itself* (that is, absent some effect on the attorney's actual conduct) is not relevant to an ineffective assistance claim.

he did. Like other courts, it thought doing so was *necessary* to follow *Strickland*'s admonition "to evaluate the conduct from counsel's perspective at the time." *Bonin*, 59 F.3d at 833 (quoting *Strickland*, 466 U.S. at 689). The Ninth Circuit considered at length counsel's testimony as to why he had made certain trial decisions and examined the records that bore on those decisions. *Id.* at 834. On the basis of counsel's testimony and the other evidence, the court concluded that the decisions were not only "tactical," *ibid.*, but also "reasonable," *id.* at 835. Examining the attorney's internal thought processes was thus necessary for determining whether his performance had been "objectively reasonable" under *Strickland*. *Bonin* does not support petitioners' claim of a conflict.

Here too a more recent decision of the court of appeals undermines petitioners' attempt to find a conflict where none exists. In *United States* v. *Alferahin*, 433 F.3d 1148 (9th Cir. 2006), the Ninth Circuit held that counsel's failure to ask for a crucial jury instruction constituted ineffective assistance precisely because "[c]ounsel's errors with the jury instructions were not a strategic decision to forego one defense in favor of another. They were the result of a *misunderstanding of the law*." *Id.* at 1161 (emphasis added). In reaching that conclusion, the court of appeals relied on the attorney's testimony in the district court that "he would have produced additional testimony if he had understood" the law properly, observing that it was "clear from the record that Alferahin's attorney did not intend strategically to forgo the materiality instruction." *Ibid.*[6] This recent—and more factually analogous—decision highlights the danger of

[6] Although the government suggested that there may have been "unarticulated strategic reasons for the actions of defense counsel," the Ninth Circuit refused to speculate as to those reasons. Instead, the court considered only the actual internal thought processes of the attorney. *Alferahin*, 433 F.3d at 1161.

divining "conflicts" from isolated language in inevitably fact-bound opinions and it makes clear that on the question petitioners seek to present there is no difference between the Third and Ninth Circuit approaches, let alone the kind of well-developed conflict that requires this Court's intervention.

As petitioners acknowledge, all the other circuits that have addressed this issue have applied *Strickland* in a manner that is undeniably consistent with the Third Circuit's decision here. Although petitioners point to only two other circuit courts (and the highest court of the District of Columbia) as having addressed this issue, Pet. 12-14,[7] respondent's research has uncovered two additional circuits, the Fifth[8] and the Sixth,[9] that have addressed the same basic question and both have taken the very same approach as the Third Circuit here.

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[7] See *Greiner* v. *Wells*, 417 F.3d 305 (2d Cir. 2005); *Kitchen* v. *United States*, 227 F.3d 1014 (7th Cir. 2000); *Chatmon* v. *United States*, 801 A.2d 92 (D.C. 2002).

[8] See *Amador* v. *Quarterman*, 458 F.3d 397, 413 (5th Cir. 2006) (finding an attorney's conduct deficient where "counsel's failure to investigate was a result of negligence rather than trial strategy" and relying on counsel's admission "that his failure to do these things served 'no strategic purpose'"); *Busby* v. *Dretke*, 359 F.3d 708, 715 (5th Cir. 2004) ("Strategic decisions * * * can rarely constitute ineffective assistance of counsel, so long as they are based on reasonable investigations of the applicable law and facts."); *Moore* v. *Johnson*, 194 F.3d 586, 604 (5th Cir. 1999) ("The Court is * * * not required to condone unreasonable decisions parading under the umbrella of strategy[] or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all."); *Loyd* v. *Whitley*, 977 F.2d 149, 158 (5th Cir. 1992) ("The crucial distinction between strategic judgment calls and plain omissions has echoed in the judgments of this court.").

[9] In *Dando* v. *Yukins*, 461 F.3d 791 (6th Cir. 2006), the Sixth Circuit recently found ineffective assistance where defense counsel had failed to investigate a potential duress defense because he misunderstood the

This unanimity among the circuits that have spoken on the issue should not surprise since any other result would conflict with this Court's decisions resolving ineffective assistance claims. In *Wiggins* v. *Smith*, 539 U.S. 510 (2003), for example, this Court rejected the State's argument that defense counsel's failure to present mitigating evidence of defendant's life history in the sentencing phase of a capital case did not amount to ineffective assistance because reasonable counsel could have—and defense counsel actually did—decide not to present a mitigation case in order to pursue an alternative strategy. *Id.* at 521. "[W]hether counsel should have presented a mitigation case," which is what petitioners' argument in this case would make central, was irrelevant. *Id.* at 523. Rather, the Court found, *Strickland*'s "objective review" required close inquiry into why defense counsel actually did not make such a case, particularly whether they were deficient in not investigating defendant's background. *Ibid.* That the attorneys' fault lay in the unreasonableness of their particular investigation rather than in their decision not to mount a mitigation defense, which the State and the original attorneys argued was reasonable, undercuts petitioners' position in this case.

Indeed, petitioners' position is inconsistent with any approach that takes seriously *Strickland*'s command "to

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law. The court noted that "[a]lthough courts are typically required to show heightened deference to an attorney's strategic decisions supported by professional judgment, where a failure to investigate does not reflect sound professional judgment, such deference is not appropriate." *Id.* at 799 (quoting *Strickland*, 466 U.S. at 690-691). The court held that "[t]he evidence in this case suggests that the attorney's decision was not an exercise in professional judgment because it reflected a misunderstanding of the law regarding the availability of a mental health expert" and thus "the state courts' determination that * * * counsel's performance was not inadequate misapplied clearly established Supreme Court precedent." *Ibid.*

evaluate the conduct from counsel's perspective at the time," 466 U.S. at 689, and would, taken to its logical extreme, excuse instances when a lawyer was present at the defense table but was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *id.* at 687. Defense counsel, for example, often advise defendants not to testify at trial and, in any particular trial, a reasonable defense counsel could almost certainly make such a recommendation. Imagine a case, however, where defense counsel believes the defendant's testimony would be helpful yet does not call him to testify in his own defense because the attorney mistakenly believes that the Fifth Amendment forbids the defendant from doing so. Counsel's understanding of the law would be exactly backwards. Under petitioners' approach, however, that would not matter. Because a hypothetical defense attorney might have declined to call the defendant for a different reason, actual counsel's fundamental mistake of law would be unchallengeable.

Even if this Court were inclined to address petitioners' first question, this case does not present a suitable vehicle for doing so. That is principally because, even if the Court were to adopt petitioners' novel view of the law, it would make no difference to the outcome of this case.

Petitioners argue that the lower courts were wrong to have looked to trial counsel's actual thought processes and his misunderstanding of the law and instead should have examined only whether a reasonable attorney could have hypothetically failed to move to suppress or to object to the witness's identification on other grounds. Petitioners assert that a reasonable attorney could have failed to do so in this case in order to pursue a "'frame-up' strategy." Pet. 11. In their view, a reasonable attorney could have invited the identification in order to examine the witness about improper police efforts to coerce the identification.

Contrary to petitioners' suggestion that "[t]he Third Circuit * * * never even discussed the 'frame-up' strategy revealed by the trial record," Pet. 11, the Third Circuit expressly rejected it:

> [A]llowing the identification in order to cross-examine [the witness] about the improper police efforts in obtaining the identification * * * does not even appear to be reasonable. Even if the identification was never made or was suppressed, counsel was still free to question [the witness] about the police tactics in procuring his since-disavowed identification during the photo array.

Pet. App. 19. In other words, the Third Circuit held that an objectively reasonable defense attorney would not have failed to move to suppress the identification in order to pursue a "frame-up" strategy because he could have pursued that strategy just as well after suppression.[10] If this Court were to grant review, it could only affirm *even under the petitioners' view of the law.*

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[10] In his Report and Recommendation, the magistrate judge also rejected the "frame-up" theory as unreasonable. He explained:

> [T]he Commonwealth's "strategy theory" fails to explain why counsel did not move to strike/suppress the in-court identification during trial. Counsel could have easily elicited [the witness's] testimony about the suggestive photo array and his statement that he only made the out-of-court identification at Detective Piree's urging, while also moving to suppress [the witness's] potential in-court identification of petitioner. In doing so, counsel would have had the benefit of showing police overreaching and evidence manipulation, without the detrimental identification of petitioner as the shooter. As such, we find that counsel's failure to move to suppress and/or strike [the witness's] in-court identification did not constitute reasonable trial strategy.

Pet. App. 53-54.

II. PETITIONERS' SECOND QUESTION, WHICH THEY FAILED TO RAISE BELOW, DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners contend that an unnoticed conflict between this Court's decisions in *Weeks* v. *Angelone*, 528 U.S. 225, 237 (2000), and *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003), has sown "confusion" in the lower courts about how 28 U.S.C. § 2254 applies when state courts have denied relief but reached fewer than all parts of a habeas petitioner's claims. Pet. 21. This asserted conflict is puzzling. *Wiggins* did not discuss *Weeks* or even cite it and no Justice in either the majority or the dissent noted any inconsistency or tension, let alone conflict, between the two cases. Petitioners' manufactured conflict between these cases does not exist and does not warrant this Court's review.

Petitioners' real complaint appears to be that the Third Circuit did not adequately defer to legal and factual findings that the state court did not make. That too is puzzling. Nothing in *Weeks* or *Wiggins* requires such an odd result and little suggests that the lower courts are confused about it. Indeed, petitioners' sole evidence of "confusion" lies in two Third Circuit cases, one of which, *Stevens* v. *Horn*, 187 Fed. App'x 205 (3d Cir. 2006), is an unpublished opinion of no precedential authority, and a lone partial, special concurrence representing the views of a single judge from the Fourth Circuit, *Allen* v. *Lee*, 366 F.3d 319 (*en banc*) (4th Cir. 2004) (Gregory, J, concurring in the judgment in part). See Pet. 23. Petitioners have presented no evidence of "confusion" compelling this Court's intervention.

Petitioners, moreover, failed to raise below the issue presented by their second question and the Third Circuit did not pass on it. That fact alone makes this case an inappropriate candidate for review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Not once in their opening

and reply briefs in the Third Circuit, or even in their petition for rehearing, did petitioners discuss this issue or even cite any of the cases they now muster in support of their second question presented. See Pet. 21-26. Those five cases—*Weeks* v. *Angelone*, 528 U.S. 225 (2000), *Wiggins* v. *Smith*, 539 U.S. 510 (2003), *Stevens* v. *Horn*, 187 Fed. App'x 205 (3d Cir. 2006), *Allen* v. *Lee*, 366 F.3d 319 (4th Cir. 2004) (*en banc*) (Gregory, J, concurring in the judgment in part), and *Rompilla* v. *Horn*, 355 F.3d 233 (3d Cir. 2004), rev'd on other grounds, 545 U.S. 374 (2005)—are all notably absent and none is cited, let alone discussed, in the Third Circuit's opinion.

In fact, Petitioners made a quite different deference argument below. Although they quoted § 2254 several times, they did so only in challenging the magistrate judge's decisions to hold an evidentiary hearing and to overturn as "based on nothing more than speculation as to counsel's intentions" the state court's factual finding that defense counsel's failure to seek suppression of the unreliable identification had been strategic. Pet. App. 51. The first heading in their opening brief highlights their argument. It states: "THE MAGISTRATE JUDGE IGNORED THE CONSTRAINTS OF THE HABEAS STATUTE BY FAILING TO ACCORD THE PRESUMPTION OF CORRECTNESS TO THE STATE COURT'S FACTUAL FINDING THAT TRIAL COUNSEL'S CHALLENGED CONDUCT WAS STRATEGICALLY BASED." Pet. C.A. Br. 20. That section opens with a general background discussion of habeas deference standards, Pet. C.A. Br. 20-21, but quickly moves on to discuss whether the magistrate judge and district court accorded proper deference to the state court's factual finding on strategy. See, *e.g.*, Pet. C.A. Br. 21 ("Under AEDPA, a state court's factual findings are presumed to be correct."); Pet. C.A. Br. 22 ("A state court's finding that trial counsel's action was strategic is a finding of fact to which the statutory presumption of correctness applies."); Pet. C.A. Br. 23 ("[T]he state court's fact-finding

process was not inadequate."); Pet. C.A. Br. 26 ("Thus, under Section 2254(d)(2), the habeas court was required to defer to the state court's factual finding that trial counsel's challenged action here was based on strategy unless this finding was unreasonable in light of the state court record."); Pet. C.A. Br. 29 ("The state court f.ctual finding that trial counsel's strategy with respect to [the witness's] identification was 'obvious,' was not unreasonable. Accordingly, the Magistrate Judge erred in refusing to accord this finding the statutory presumption of correctness and in granting the evidentiary hearing.").[11]

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[11] Only one other section of the petitioners' opening brief even mentions the standard of review applied by the magistrate judge. Section II(A)'s header states: "IN REVIEWING THE CLAIM OF INEFFECTIVE ASSISTANCE *DE NOVO*, THE DISTRICT COURT ERRED IN ASSESSING WHETHER TRIAL COUNSEL'S PERFORMANCE WAS 'OBJECTIVELY REASONABLE' IN LIGHT OF THE COURSE THAT HE ACTUALLY PURSUED AT TRIAL." Pet. C.A. Br. 30. It too refers to the magistrate judge's factual finding that trial counsel's failure to seek suppression was objectively unreasonable, as the first prong of *Strickland* requires. The substantive discussion immediately following this header makes clear that in this section petitioners were contesting the merits of the magistrate judge's *de novo* factual analysis after he had rejected the state court's factual finding of strategy, not the degree of deference he applied. It states:

> Having thus concluded that AEDPA's deferential standard did not apply, the Magistrate Judge considered *de novo* the merits of the claim that trial counsel was ineffective for not renewing his previously withdrawn motion to suppress or for not objecting when, at trial, [the witness] identified Clayton Thomas as the shooter. In evaluating the performance prong of the *Strickland* test, however, the Magistrate Judge failed to consider whether the course that trial counsel actually followed was "objectively reasonable.

Pet. C.A. Br. 30. The first sentence of this paragraph simply describes what the magistrate judge did. The second, as the word "however" indicates, lays out the petitioners' objection: that the magistrate

Petitioners' reply brief makes even clearer the fact that their deference argument extended only to the state court's factual finding that trial counsel's actions were strategic. The relevant heading reads "THE FEDERAL COURT WAS REQUIRED TO DEFER TO THE STATE COURT'S FACTUAL FINDING AND ITS DECISION TO GRANT AN EVIDENTIARY HEARING WAS ERROR." Pet. C.A. Reply Br. 1. The petitioners summarized their own argument as follows:

> As discussed in the Commonwealth's principal brief, the state court's finding that the trial counsel's action was strategically-based was a factual finding. Under the provisions of the habeas statute which govern review of state court factual findings, the district court thus could grant relief only if it determined that this factual finding was objectively unreasonable in light of the evidence presented in state court under § 2254(d)(2). Further, federal courts presume that the state court's factual finding is correct pursuant to § 2254(e)(1).

Pet. C.A. Reply Br. 1-2 (citations omitted). "[U]nder Section 2254(d)(2)," the brief later states, "*the only question here* is whether the state court's factual finding was objectively unreasonable in light of the state court record." Pet. C.A. Reply Br. 2 (emphasis added). Petitioners' only deference argument concerned whether the magistrate judge had properly deferred to the state court's factual finding on strategy, not whether the magistrate judge had applied the

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judge's fact-finding on this issue was wrong. The rest of this section of their brief discusses at length why they believed that trial counsel acted in an "objectively reasonable" way. Pet. C.A. 30-37. It argues only the factual merits of the underlying claim, however—whether the first prong of *Strickland* was met—not the standard of review federal courts should apply under § 2254 more generally.

proper standard of review to legal and factual issues arising for the first time in the federal habeas proceedings.[12]

In short, petitioners failed to raise any issue of proper deference under § 2254 for anything other than the state court findings of fact that the magistrate judge had found to be "based on nothing more than speculation." Pet. App. 51. In particular, they raised no issue about "whether the deference standard is appropriately extended or withheld on a point-by-point basis, to parts and subparts of claims rather than to claims as a whole," Pet. 23, and the Third Circuit did not address or discuss that issue. Under this Court's long-standing and consistent practice of denying certiorari "when the question presented was not pressed or passed upon below," *Williams*, 504 U.S. at 41; *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927), this Court should deny review of petitioners' second question. They raised—and the Third Circuit decided—a much different question, which respondent has framed as an

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[12] Pet. C.A. Reply Br. 3 ("As discussed in Appellants' Brief, at 26-29, the state court record, when considered as a whole fully supported the state court's finding."); Pet. C.A. Reply Br. 4 ("[T]he court * * * reviewed the issue *de novo*, placing undue emphasis on the testimony adduced at the federal hearing while failing to properly consider the relevant parts of the state court record, which supported the finding that trial counsel had acted pursuant to a coherent strategy."); Pet. C.A. Reply Br. 5 ("Rather than proceeding within the confines of habeas review, specifically § 2254(d)(2), the Magistrate Judge refused to defer to the state court's record-based factual finding."); Pet. C.A. Reply Br. 7 ("[T]here was no basis for the federal court's refusal to defer to the state court's factual finding here or to apply a lesser degree of deference. Accordingly, the Magistrate Judge's conclusion that he was not bound by the state court's factual finding here was error. As this error was the springboard which launched the federal court's independent factual inquiry, the federal proceedings which followed are void.").

alternative second question. As framed, this question was certainly raised below, but it is hardly worthy of this Court's review.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

MARK T. STANCIL*
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

DANIEL SILVERMAN
Silverman & Associates, P.C.
1429 Walnut Street
Suite 1001
Philadelphia, PA 19102
(215) 665-8622

DAVID T. GOLDBERG
David T. Goldberg Law Office
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

**Counsel of Record*

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[13] To the extent petitioners' assertions that these issues are presented in "almost every habeas case," Pet. 21, are true or their as-yet unrealized forecasts of "confusion," Pet. 21, or "unhappy results," Pet. 22, from the interplay of this Court's prior decisions prove correct, this Court will be presented with no shortage of opportunities (in cases where the issue was actually briefed and litigated in the lower courts) to address it.